

1 Documents in defendant's files reveal that L. A. Cellular also suggested tactics  
2 to its customer service personnel which would discourage customers from seeking a  
3 review of their bills and a full credit. For example, customer care representatives are  
4 encouraged to get the few customers who request a dropped call credit to accept a  
5 percentage off their bill rather than actually figuring out the line-by-line credit for  
6 each dropped call. They are trained that the percentage should start low - about 4% -  
7 and not disclosed to the customer. Pl. Statement 58. By the terms of the tariff and  
8 company policy, whether to even issue a credit for a dropped call is at the discretion  
9 of the customer care manager. Pl. Statement 59. If a customer requests a line-by-line  
10 review of his or her calls, the customer service agent is instructed to "try to discourage  
11 the customer from highlighting and mailing the bills in unless they insist - Negotiate."  
12 Pl. Statement 60.

### 13 **III. LEGAL STANDARDS GOVERNING THIS MOTION**

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15 Summary judgment is proper where "there is no triable issue as to any material  
16 fact" and "the moving party is entitled to a judgment as a matter of law." Cal. Civ.  
17 Proc. § 437(c). Summary adjudication is proper where "a cause of action has no  
18 merit" and granting a motion "completely disposes of a cause of action." Cal. Civ.  
19 Proc. § 437(f).

20  
21 In this case, plaintiff has produced evidence proving liability under Business  
22 and Professions Code §§ 17200 and 17500 for untrue and misleading advertising, and  
23 for unfair business practices, as well as for unjust enrichment. The burden therefore  
24 shifts to L.A. Cellular to show "that a triable issue of one or more material facts exist  
25 as to those causes of action . . . ." Cal. Civ. Proc. § 437(c)(o)(2). L.A. Cellular cannot  
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1 meet this burden and so plaintiff is entitled to summary judgment or, in the  
2 alternative, summary adjudication.

3  
4 **IV. DEFENDANT L.A. CELLULAR IS LIABLE UNDER BUSINESS AND**  
5 **PROFESSIONS CODE SECTIONS 17200 and 17500**

6 There are no disputed issues of fact or law as to whether L.A. Cellular is liable  
7 for false advertising and unfair business practices under the California Unfair Business  
8 Practices Act.

9 The evidence overwhelmingly supports the allegation that L A. Cellular kept its  
10 customers in the dark as to its dropped-call credit policy. L. A. Cellular made no  
11 disclosures to customers of the dropped-call credit either in its bills, marketing  
12 materials, contracts, or informational packages, and never discussed dropped-call  
13 credits with customers unless they specifically requested the information first. The  
14 vague and ambiguous L. A. Cellular tariff also does not adequately disclose  
15 defendant's dropped-call credit policy.<sup>13</sup> The evidence also shows consumers were  
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18 <sup>13</sup> Breach of contract cases where the issue is whether a party had actual or constructive notice of  
19 the terms of the contract provide an incisive analogy. In Scott's Valley Fruit Exchange v. Growers  
20 Refrigeration Co., 81 Cal. App. 2d 437, 447 (1st Dist. 1947), the court concluded that, for a party to be  
21 bound by the terms of a document incorporated by reference in the contract, the terms must have been  
22 known or easily available to the party. Id. at 447. See also Williams Construction Co. v. Standard-  
23 Pacific Corp., 254 Cal. App. 2d 442, 61 Cal. Rptr. 912 (4<sup>th</sup> Dist. 1967) (following Scott's Valley).  
24 Particularly with respect to standardized contracts between parties of unequal bargaining strength as  
25 here, terms hurting the less powerful party are ineffective in the absence of plain and clear notification  
26 and an understanding consent. Bauer v. Jackson, 15 Cal. App. 3d 358, 93 Cal. Rptr. 43 (4<sup>th</sup> Dist. 1971)  
27 (trial court erred in ruling shipper bound, as matter of law, by contract provision limiting the carrier's  
28 liability, issue of shipper's knowledge was question of fact.

25 It would be unreasonable to expect a cellular phone company's customers to have extensive  
26 knowledge of tariff terms or to place on each of them the onerous burden of having to locate and read  
27 the extensive tariff just to find out basic information about their service rights and obligations:

27 It may be reasonable to presume that a sophisticated commercial shipper  
28 contracts with knowledge of tariff regulations but such presumption has no reasonable

1 confused about the difference between a dropped call and incomplete call and were  
2 likely to have been misled into thinking that they already received any credit to which  
3 they were entitled.

4 Only a small percentage of customers received dropped call credits. The  
5 overwhelming majority of customers have never asked for or received these credits  
6 because of the lack of information provided by L. A. Cellular. Pl. Statement 49.  
7 Plaintiff was not aware of the availability of dropped-call credits. Pl. Statement 31.  
8 The fact that a very small percentage of defendant's customers requested and  
9 received dropped-call credits strongly supports judgment in favor of plaintiff.  
10

11 Plaintiff need only show that members of the public are "likely to be deceived",  
12 unlike common law fraud, where it is required that someone actually be deceived, rely  
13 upon the fraudulent practice and sustain damage. State Farm Fire & Casualty Co. v.  
14 Superior Court, 53 Cal. Rptr. 2d 229, 45 Cal. App. 4<sup>th</sup> 1093 (1996). "Allegations of  
15 actual deception, reasonable reliance and damage are unnecessary." Committee on  
16 Children's Television v. General Foods Corp., 35 Cal. 3d 197, 210 (1983). Thus, the  
17 Unfair Competition Act imposes strict liability; it is not necessary to show that L.A.  
18 Cellular intended to mislead anyone. State Farm, supra.  
19

20 Strong support exists for finding that a failure to disclose beneficial policies is  
21 an unfair or deceptive trade practice. In In The Matter of Chrysler Corp., 96 F.T.C.  
22

23  
24  
25 basis in experience in the case of a passenger or an ordinary member of the public  
contracting for the services of a common carrier for a non-business shipment.

26 Muelder v. Western Greyhound Lines, 8 Cal. App. 3d 319, 333 (4th Dist. 1970). The same is true for  
27 a consumer of cellular phone services. What L. A. Cellular would have this Court accept is not only  
28 unrealistic and fanciful but would allow defendant to "easily sandbag" customers, as done here.

1 134 (1980) and In The Matter of Ford Motor Co., 96 F.T.C. 362 (1980), the Federal  
2 Trade Commission charged both auto manufacturers with "unfair or deceptive"  
3 conduct under the Federal Trade Commission Act for concealing reimbursement  
4 practices from their customers. In Chrysler, the company was held culpable for its  
5 practice of providing replacement fenders free of charge, but concealing this practice  
6 from its customers. In Ford, its concealed practice of compensating customers for  
7 certain defenses was held to be "unfair or deceptive":  
8

9 In most, if not all, instances such purchasers are not compensated  
10 because they are not aware of respondent's programs. Such failures to  
11 disclose are deceptive or unfair acts or practices.

12 96 F.T.C. at 134 (emphasis added).

13 Other courts also have determined that a failure to disclose material terms is  
14 deceptive. See e.g., United States v. 95 Barrels (More or Less) Alleged Apple Cider  
15 Vinegar, 265 U.S. 438, 531 (1924) (where defendant failed to disclose that apple cider  
16 vinegar was made from dried or evaporated apples, rather than fresh apples); FTC v.  
17 Colgate Palmolive Co., 380 U.S. 374 (1965) (undisclosed use of prop or mockup made  
18 of plexiglas to which sand had been applied in television commercial which showed the  
19 application of shaving cream to what appeared to be sandpaper and razor shaving the  
20 substance clean was deceptive practice); Committee on Children's Television, supra,  
21 (failure to disclose sugar content of breakfast cereals); Day v. AT&T Corp., 63 Cal.  
22 App. 4<sup>th</sup> 325, 334 (1998) (failure to disclose that calls will be charged by rounding up  
23 to the next full minute) at 334; People v. Dollar Rent A Car Systems, Inc., 211 Cal.  
24 App. 3d 119, 129 (1989) (failure to disclose full terms of rental car insurance).  
25  
26

27 The "test of whether a business practice is unfair" involves an examination of  
28

1 [that practice's] impact on its alleged victim, balanced against the reasons,  
2 justifications and motives of the alleged wrongdoer. In brief, the Court must weigh  
3 the utility of the defendant's conduct against the gravity of the harm to the alleged  
4 victim. . . ." State Farm, supra, at 1103. <sup>14</sup> "The court may conclude that an unfair  
5 business practice occurred "when that practice 'offends an established public policy or  
6 when the practice is immoral, unethical, oppressive, unscrupulous or substantially  
7 injurious to consumers.'" Id. at 1103. Here, there is no justifiable business reason for  
8 L.A. Cellular's failure to disclose their dropped call credit policy except its motive to  
9 reap undeserved profits. Meanwhile, unsuspecting subscribers were duped into  
10 believing that they were receiving credit for all calls that were involuntarily terminated,  
11 i.e., not charged for "incomplete" calls. L.A. Cellular's continued and deliberate  
12 concealment of its dropped call policy is unfair, unethical, unscrupulous and  
13 substantially injurious to consumers.  
14

15  
16 In this case, this Court need not decide whether certain misrepresentations  
17 were made or whether certain statements were likely to mislead a consumer since L.A.  
18 Cellular made absolutely no disclosure of its dropped call credit policy. Thus, the  
19 evidence overwhelmingly supports the conclusion that L.A. Cellular engaged in  
20 misleading advertising and unfair business practices. L.A. Cellular knew that its  
21 customers were unaware of the dropped call credit. It knew that it could increase its  
22 revenue stream substantially by keeping its customers in the dark about the availability  
23 to the credit. It could have disclosed the dropped-call credit in its bills, marketing  
24  
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26  
27 <sup>14</sup> However, see Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961) ("actual consumer  
28 testimony is in fact not needed to support an inference of deceptive-ness. . .")

1 materials, its contracts or its informational packages. Instead, it chose to omit that  
2 information, enriching itself to the detriment of its customers As in the above cases,  
3 this was a deceptive business practice amounting to fraud on consumers.

4  
5 **V. L.A. CELLULAR IS LIABLE FOR UNJUST ENRICHMENT**

6 Plaintiff is entitled to judgment on her unjust enrichment claim. An individual  
7 is required to make restitution "if he or she is unjustly enriched at the expense of  
8 another . . . For the same reasons, a person is enriched if the person receives a  
9 benefit at another's expense. Benefit means any type of advantage." First Nationwide  
10 Savings v. Perry, 11 Cal. App. 4<sup>th</sup> 1657, 1662 (1992).

11 There are no triable issues of fact as to L.A. Cellular's unjust enrichment. L.A.  
12 Cellular has been unjustly enriched at the expense of its subscribers, and should not be  
13 allowed to retain profits attributable to failing to give credits for dropped calls.

14  
15 **VI. CONCLUSION**

16 Plaintiff's motion for summary judgment, or in the alternative for summary  
17 adjudication should be granted in its entirety.

18  
19 Dated: April 16, 1999

LAW OFFICES OF LIONEL Z. GLANCY

20  
21 By 

22 Lionel Z. Glancy, Esquire  
23 Peter A. Binkow, Esquire  
24 Attorneys for Plaintiff  
25 1801 Avenue of the Stars  
26 Suite 308  
27 Los Angeles, California 90067  
28 (310) 201-9150

1 MICHAEL B. HYMAN  
2 MARY JANE EDELSTEIN FAIT  
3 ELLYN M. LANSING  
4 MUCH SHELIST FREED DENENBERG  
5 AMENT BELL & RUBENSTEIN, P.C.  
6 200 North LaSalle Street, Suite 2100  
7 Chicago, IL 60601-1095  
8 (312) 346-3100

9 KEITH S. SHINDLER  
10 LAW OFFICES OF KEITH S. SHINDLER  
11 839 West Van Buren  
12 Chicago, IL 60607  
13 (312) 421-1000





LIONEL Z. GLANCY #134180  
PETER A. BINKOW #173848  
LAW OFFICES OF LIONEL Z. GLANCY  
1801 Avenue of the Stars, Suite 308  
Los Angeles, California 90067  
(310) 201-9150

MICHAEL B. HYMAN  
MARY JANE EDELSTEIN FAIT  
MUCH SHELIST FREED DENENBERG  
AMENT BELL & RUBENSTEIN, P.C.  
200 North LaSalle Street, Suite 2100  
Chicago, IL 60601-1095  
(312) 346-3100

Attorneys for Plaintiff  
[Additional Counsel Listed On Signature Page]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ERIKA LANDIN on behalf of herself and all  
others similarly situated,

Plaintiff,

v.

LOS ANGELES CELLULAR TELEPHONE  
COMPANY d/b/a L.A. CELLULAR OF  
CALIFORNIA, a California corporation,

Defendant.

) Case No. BC 143305

) Hon. Ernest Hiroshige

) CLASS ACTION

) PLAINTIFF'S SEPARATE  
) STATEMENT OF  
) UNDISPUTED FACTS IN  
) SUPPORT OF MOTION FOR  
) SUMMARY JUDGMENT OR,  
) IN THE ALTERNATIVE,  
) SUMMARY ADJUDICATION

) [Memorandum of Law;  
) Declaration of Lionel Z. Glancy;  
) Appendix of Non-California and  
) Regulatory Authority Filed  
) Herewith]

Date: May 26, 1999  
Time: 8:30 a.m.  
Dept. 54  
Trial: July 14, 1999

1 In accordance with Section 437 of the California Code of Civil Procedure and  
2 Rule 9.21 of the Los Angeles Court, Superior Court, plaintiff, by her attorneys, hereby  
3 submits her Separate Statement of Undisputed Facts in Support of her Motion For  
4 Summary Judgment or, in the Alternative, Summary Adjudication:  
5

<u>No.</u>	<u>Undisputed Facts</u>	<u>Evidentiary Support</u>
	<b>The Tariff Did Not Adequately Disclose L. A. Cellular's Policy With Regard To Dropped Calls</b>	
1.	L.A. Cellular has filed with the PUC its Retail Tariff and Special Conditions Applicable to the Cellular Radio Telecommunications Service and its General Rules Applicable to Cellular Radio Telecommunications Service ("L.A. Cellular's tariffs").	L.A. Cellular's Separate Statement of Undisputed Facts filed in Support of Its Motion for Summary Judgment or, in the Alternative, Summary Adjudication (hereinafter "LAC's Statement")
2.	Part 6 of Rule 14 states that "[I]n the case of dropped or garbled calls, and on receipt of appropriate proof, the Utility will extend credit to the customer for part or all of the usage charges applicable to the calls in question."	LAC's Statement #3
3.	L.A. Cellular added Part 6 of Rule 14 to its tariff by Advice Letter No. 15, which became effective on December 6, 1988.	LAC's Statement #4
4.	L.A. Cellular added Part 8 of Rule 14 to its tariff by Advice Letter No. 555, which became effective on January 24, 1995.	LAC's Statement #5

- 1 5. Part 8 of Rule 14 states that "[c]laims for LAC's Statement #6  
2 credits by non-reseller customers on  
3 account of service interruptions or for  
4 missed, dropped or garbled calls shall be  
5 made within ninety days after the end of  
6 the relevant customer's billing cycle in  
7 which the interruption or other  
8 malfunction is alleged to have occurred."  
9
- 10 6. L.A. Cellular provides a dropped-call LAC's Statement #7  
11 credit upon the request of a customer  
12 when a customer redials a call within  
13 five minutes after that call is dropped.  
14
- 15 7. The amount of the dropped-call credit is LAC's Statement #8  
16 the air time cost to the customer of the  
17 first minute of the redialed call.  
18
- 19 8. L. A. Cellular defines a "dropped call" as Page LLAC018906 in memo on  
20 when a cellular customer's call is meeting with Steve Bagio.  
21 disconnected without the caller having Fowler Dep. 26:21-27:3  
22 pressed the "END" key or hanging up. (Binkow Dec. Ex. A<sup>1</sup>)  
23
- 24 9. L. A. Cellular's current tariff is almost Entire tariff  
25 300 pages long. (Binkow Dec. Ex. B)  
26
- 27 10. Dropped calls are common. Deposition Exhibit 15  
28 (Binkow Dec. Ex. C)
11. L. A. Cellular's tariff does not define Fowler Dep. 63:6-14, (Glancy  
"dropped call". Dec. Ex. A<sup>2</sup>)  
Tariff at LLAC000640-642  
(Binkow Dec. Ex. B)

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<sup>1</sup> All references to "Binkow Dec." are from the Declaration of Peter A. Binkow In Support of Plaintiff's Opposition To Motion For Summary Judgment filed on October 30, 1997.

<sup>2</sup> All references to "Glancy Dec." refer to the Declaration of Lionel Z. Glancy In Support Of Plaintiff's Motion For Summary Judgment filed concurrently herewith.

- 1 12. L. A. Cellular's tariff does not define  
2 what "appropriate proof" means in its  
3 limitation of liability, paragraph 6, but  
4 L.A. Cellular received proof from the  
5 billing itself: such as two calls to the  
6 same number within a five minute  
7 period.  
8  
9 13. L. A. Cellular's tariff does not indicate  
10 that it is the customer's responsibility to  
11 seek the credit.  
12  
13 14. L. A. Cellular's tariff does not define  
14 what the tariff means in stating that L.  
15 A. Cellular would extend credit to the  
16 customer for "part or all of the usage  
17 charges applicable to the calls in  
18 question" in paragraph 6 of Rule 14.  
19 Moreover, Fowler did not even know  
20 what this phrase means.  
21  
22 15. L. A. Cellular's 1995 addition to the  
23 tariff requiring that credits be claimed  
24 within 90 days of the end of a customer's  
25 billing cycle was not adequately  
26 disclosed. The tariff does not define  
27 "dropped calls", "billing cycle" or  
28 "reseller".  
29  
30 16. Fowler was unaware that there is a 90-  
31 day time limitation for requesting credit  
32 for dropped calls, and said, if there was  
33 such a limitation, he would know what it  
34 would be.

Tariff Rule No. 14, (Binkow  
Dec. Ex. D)  
Fowler Dep. 64:10-12, 66:10-  
16, (Glancy Dec. Ex. A)  
Core Service Skills at  
LLAC000612 (Binkow Dec. Ex.  
E)

Tariff (Binkow Dec. Ex. B)

Tariff (Binkow Dec. Ex. B),  
Fowler Dep. 67:8-18, 68:14-69:6  
(Glancy Dec. Ex. A)

Tariff (Binkow Dec. Ex. B)

Fowler Dep. 41:5-19 (Glancy  
Dec. Ex. A)

- 1 17. L. A. Cellular's tariff does not disclose Tariff (Binkow Dec. Ex. B)  
2 that L. A. Cellular provides a dropped-  
3 call credit upon request of a customer  
4 when a customer redials a call within  
5 five minutes after that call is dropped  
6 and the customer has not placed any  
7 intermediate calls prior to returning the  
8 dropped call.
- 9 18. L. A. Cellular's tariff does not disclose Tariff Rule No. 14  
10 that the amount of the dropped call (Binkow Dec. Ex. D)  
11 credit is the air time cost to the  
12 customer of the first minute of the  
13 redialed call.
- 14 19. L. A. Cellular's tariff does not disclose Tariff Rule No. 14  
15 that L. A. Cellular's service (Binkow Dec. Ex. D)  
16 representatives do not have access to a  
17 customer's dialing records for any given  
18 month until after the end of the billing  
19 cycle for that month.
- 20 **L. A. Cellular Concealed Its Dropped**  
21 **Call Credit Policy From Consumers**
- 22 20. Dropped calls are not identified Fowler Dep. Ex. 14 at  
23 anywhere on the monthly bill. LLAC018812  
24 (Binkow Dec. Ex. N)
- 25 21. While L. A. Cellular's training manual Fowler Dep. 71:3-20 (Glancy  
26 discusses dropped call credits, the Dec. Ex. A)  
27 training manual is not given to  
28 customers.
- 29 22. No L. A. Cellular documents defining Fowler Dep. Ex. 6, (Binkow  
30 "dropped calls" are ever sent to a Dec. Ex. F) Fowler Dep. 87:14-  
31 customer without the customer first 88:2  
32 requesting such information. (Glancy Dec. Ex. A)

- 1 23. Nowhere in the L. A. Cellular training Fowler Dep. 123:4-11 (Glancy  
2 manual are employees told to discuss Dec. Ex. A)  
3 what a dropped call is and how to give a  
4 dropped call credit.
- 5 24. Customer care representatives are Fowler Dep. 39:14-17, 58:10-14,  
6 trained to discuss dropped call credits 130:21-131:9, 137:16-22 (Glancy  
7 only after a customer first requests that Dec. Ex. A)  
8 specific credit.
- 9 25. When a customer reports that he is Fowler Dep. Ex. 16 (Binkow  
10 experiencing what L. A. Cellular Dec. Ex. G)  
11 determines is a dropped call, the  
12 representative does not necessarily  
13 inform the customer of L. A. Cellular's  
14 policy for handling dropped call credits,  
15 but instead merely states that it could be  
16 a geographical or mechanical problem.
- 17 26. There is no evidence that L. A. Cellular Fowler Dep. 27:18-28:5, 29:18-  
18 provided copies of its tariff to Customer 22  
19 Care representative-trainees and copies (Glancy Dec. Ex. A)  
20 of the tariff are not maintained in the  
21 Customer Care Department.
- 22 27. L. A. Cellular sent customers a Fowler Dep. Ex. 21  
23 document "How To Read Your Bill", but (Binkow Dec. Ex. H)  
24 it did not define "dropped call", explain  
25 how to get a dropped call credit, or  
26 explain the difference between dropped  
27 calls and incomplete calls.
- 28 28. On the back of L. A. Cellular's bill, L. "Terms and Conditions"  
LLAC000427  
(Binkow Dec. Ex. I)  
A. Cellular describes certain "Terms and  
Conditions", but again nowhere does it  
define "dropped call", or explain how to  
get a dropped call credit.

- 1 29. Customer contract forms produced by Agreement for cellular service  
2 defendant do not define or refer to the (Master Customer Agreement  
3 fact that customers can get credit for and Cellular Service  
4 dropped calls. Agreement) (Binkow Dec. Ex.  
J)
- 5 30. The extensive information packets and Welcome Guide 1996,  
6 "Welcome Kits" provided to new Welcome Kit undated, (Binkow  
7 customers do not define or mention Dec. Ex. K,L), Cellular Services  
8 dropped calls or dropped call credits. Brochure (Glancy Dec. Ex. B)
- 9 31. Plaintiff Landin never received notice of Landin Dec.<sup>3</sup> ¶¶ 2-6.  
10 what L. A. Cellular meant by the term  
11 "dropped call" or that she could get  
12 credit for dropped calls.
- 13 32. L. A. Cellular's Vice President of Fowler Dep. 19:11-20:12, 21:4-  
14 Customer Care, Stephen Fowler, does 26:14, 27:18-28:7, 39:18-40:2  
15 not have personal knowledge as to a (Glancy Dec. Ex. A)  
16 number of issues discussed in his  
17 declaration. Fowler does not train or  
18 supervise Customer Care representatives  
19 and is not knowledgeable as to all of the  
20 training materials or information  
21 provided to them.
- 22 33. Fowler does not know the actual number Fowler Dep. 90:5-91:13 (Glancy  
23 of dropped call credits given to Dec. Ex. A)  
24 customers, only the number of "courtesy  
25 credits", which include all reductions of  
26 one's bill as a result of a request that the  
27 bill was not right or the service did not  
28 meet a customer's expectations in some  
way.
34. Fowler does not hear what customer Fowler Dep. 49:9-50:10 (Glancy  
service representatives say to customers. Dec. Ex. A)

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<sup>3</sup> All references to "Landin Dec." refer to the Declaration of Erika Landin filed on October 30, 1997.

- 1 35. Fowler does not know the length of L.  
2 A. Cellular's tariff, could not identify L.  
3 A. Cellular's current tariff, and did not  
4 know the provisions regarding dropped  
5 calls in the current tariff. Fowler Dep. 30:4-32:4, 54:5-  
6 55:2  
7 (Glancy Dec. Ex. A)
- 8 36. In his deposition, Fowler testified about  
9 a form letter advising customers about  
10 dropped call credits. But, by the terms  
11 of the letter, it was sent only after a  
12 customer's request. Fowler Dep. Ex. 6, (Binkow  
13 Dec. Ex. F)  
14 Fowler Dep. 86:18-87:2,  
15 (Glancy Dec. Ex. A)
- 16 37. Fowler did not know if such a letter was  
17 actually ever sent to customers. Fowler Dep. 83:7-15 (Glancy  
18 Dec. Ex. A)
- 19 38. L. A. Cellular is certainly capable of  
20 providing adequate disclosure of its  
21 dropped call credit policy to customers.  
22 Prior to 1996, L. A. Cellular only  
23 charged 50% of its regular service rate  
24 for incomplete calls and marked these  
25 calls on monthly bills with the letter "I"  
26 to the left of the number called. This  
27 policy was directly disclosed to customers  
28 on the face of their bills ("Incomplete  
call 50% of Reg. Serv. Rate") and on the  
back of their service contract. Fowler Dep. Ex. 22,  
LLAC001000 (Glancy Dec. Ex.  
C)  
Fowler Dep. Ex. 16.  
(Binkow Dec. Ex. G)
39. L. A. Cellular defines "incomplete calls"  
as calls that result in a busy signal or no  
answer or if the customer does not  
completely dial the number before  
pressing "send". Fowler Dep. Ex. 16, (Binkow  
Dec. Ex. G) Fowler Dep. Ex.  
14 at LLAC01881  
(Binkow Dec. Ex. N)
40. To date, L. A. Cellular has not produced  
documents relating to L. A. Cellular's  
disclosure of its policy regarding  
incomplete calls, although plaintiff has  
requested them. Letter from attorney for L. A.  
Cellular Robert H. Wright to  
attorney for plaintiff Mary Jane  
Fait  
(Binkow Dec. Ex. O)



- 1 41. L. A. Cellular's tariff and billing Tariff, (Binkow Dec. Ex. B)  
2 statement do not explain the difference Landin's bill and \"Terms and  
3 between dropped calls and incomplete Conditions\"  
calls. (Binkow Dec. Ex. P)
- 4 42. As of September 1, 1996, after this Fowler Dep. 193:5-13  
5 lawsuit was filed, L. A. Cellular decided (Glancy Dec. Ex. A)  
6 to stop charging for incomplete calls but  
7 decided against giving an automatic  
credit for dropped calls.
- 8 43. L. A. Cellular's change in policy LLAC001089 (on Landin bill)  
9 regarding incomplete calls was (Binkow Dec. Ex. P)  
10 announced directly on L. A. Cellular's  
11 bills: \"L. A. Cellular is no longer  
12 charging for incomplete calls made on  
and after September 1, 1996. Such calls  
will no longer appear on your bill.
- 13 44. L. A. Cellular also advertised to its Fowler Dep. 265:1-15  
14 customers that it no longer charged for (Glancy Dec. Ex. A)  
incomplete calls.
- 15 45. L. A. Cellular knows that customers are Fowler Dep. Ex. 16 at  
16 confused about the difference between LLAC001640  
17 \"dropped\" and \"incomplete\" calls. (Binkow Dec. Ex. G)
- 18 **L. A. Cellular Has A Profit Motive For**  
19 **Concealing Its Dropped Call Credit**  
20 **Policy**
- 21 46. Other cellular telephone companies, Fowler Dep. 175:9-16, (Glancy  
22 including L. A. Cellular's direct Dec. Ex. A)  
23 competitor, Air Touch, give automatic memo from Victor Petralia to  
24 dropped call credits, so there is no doubt Jordan Roderick (Binkow Dec.  
that the system is technologically Ex. Q), Exhibit 25  
feasible. (Binkow Dec. Ex. R)
- 25 47. In fact, Air Touch advertises its LLAC018910 (Glancy Dec. Ex.  
26 automatic credit directly to customers. D)
- 27  
28

- 1 48. In 1993 and again in 1996, L. A. Cellular LLAC001678 (Mike Kennedy  
2 was considering whether to adopt an Memo) (Binkow Dec. Ex. S)  
3 automatic dropped call credit system. Fowler Dep. 166:11-13, 169:3-7  
(Glancy Dec. Ex. A)
- 4 49. As a result of these evaluations, L. A. Letter from Alan Ayers to  
5 Cellular knew that the vast majority of Lydia Castillo 6/3/96;  
6 dropped calls never resulted in credits. (Binkow Dec. Ex. T)  
7 L. A. Cellular memos from  
8 Steve Berns to Ery Smith dated  
9 6/17/96 and 8/7/96  
10 (Glancy Dec. Ex. E)
- 11 50. Defendant's documents show, and Fowler Dep. Ex. 13  
12 Fowler could not dispute, approximately (Binkow Dec. Ex. V)  
13 5% of all L. A. Cellular calls are  
14 dropped or in excess of 2.3 million calls  
15 per month.<sup>4</sup>
- 16 51. Defendant's policy for obtaining Fowler Dep. 116:20-117:2  
17 dropped-call credits requires customers (Glancy Dec. Ex. A)  
18 to call defendant's "customer care"  
19 department.
- 20 52. According to defendant's own analysis of LLAC018801 (Doc. Entitled  
21 an automatic system, defendant would "Dropped Calls-Meet  
22 lose at least \$3 million per year in air Competition")  
23 time revenue by crediting dropped calls (Binkow Dec. Ex. W)  
24 automatically. That means that and Statistical Analysis Report  
25 defendant's customers are losing at least LLAC018587  
26 \$3 million per year in dropped-call (Binkow Dec. Ex. X)  
27 credits.  
28

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<sup>4</sup> Fowler had no knowledge to confirm or deny this statistic although plaintiff had specifically stated in her deposition notice that she wanted to ask questions about dropped calls and L. A. Cellular's analysis of adopting an automatic credit for dropped calls. Fowler Dep. 151:16, 152:11, 165:12-16, Dep. Notice. When the present stay of discovery is lifted, plaintiff intends to depose employees of L.A. Cellular regarding dropped call statistics.

- 1 53. Customer care receives only 28,000 calls Fowler Dep. Ex. 13  
2 per month, 336,000 calls per year (Binkow Dec. Ex. V)  
3 regarding dropped calls. Assuming each  
4 call was about a single dropped call, this  
5 represents less than 1½ % of all dropped  
6 calls.
- 7 54. In 1993, L. A. Cellular calculated that LLAC001678 (Memo dated  
8 the automatic dropped call credit would July 28, 1993 from Mike  
9 reduce air time revenue by about 1%. Kennedy to Mike Heil);  
10 1% of L.A. Cellular's revenue for (Binkow Dec. Ex. S)  
11 February, 1997, for example, was 1% x Los Angeles Cellular  
12 \$34,612,928 or \$346,129 per month or Telephone 1997 Income  
13 over \$4,000,000 for 1997. Statement  
(Glancy Dec. Ex. F)
- 14 55. Fowler's "opinion" that 80 to 90 percent Fowler Dep. 196:2-10, 22,  
15 of L. A. Cellular customers know how to 197:1-12  
16 get dropped call credits is not based on (Glancy Dec. Ex. A)  
17 personal knowledge or any computer  
18 tracking done through L. A. Cellular.
- 19 **L. A. Cellular's Policy and Practices As**  
20 **To Dropped Call Credits Made It**  
21 **Difficult To Obtain A Credit**
- 22 56. L. A. Cellular's bills do not identify Fowler Dep. Ex. 14 at  
23 dropped calls. LLAC018812  
24 (Binkow Dec. Ex. N)
- 25 57. Rather than being able to seek a credit Tariff Rule 14  
26 for a dropped call at the time of the call, (Binkow Dec. Ex. D)  
27 after January 24, 1995, customers had to  
28 wait until they received their next billing  
statement.

1 58. Customer care representatives are Fowler Dep. Ex. 16,  
2 encouraged to get the few customers (Binkow Dec. Ex. G)  
3 who request a dropped call credit to Fowler Dep. 219:6-11  
4 accept a percentage off their bill rather (Glancy Dec. Ex. A)  
5 than actually figuring out the line-by-line  
6 credit for each dropped call. They are  
7 trained that the percentage should start  
8 low - about 4% - and not disclosed to  
9 the customer.

10 59. By the terms of the tariff and company Interoffice Memo dated 2/5/93  
11 policy, whether to issue a credit to a at LLAC001683,  
12 customer for a dropped call is at the (Binkow Dec. Ex. Y)  
13 discretion of the Customer Care Tariff (Binkow Dec. Ex. B)  
14 Manager.

15 60. If a customer requests a line-by-line Fowler Dep. Ex. 16  
16 review of his or her calls, the customer (Binkow Dec. Ex. G)  
17 service agent is instructed to "try to  
18 discourage the customer from  
19 highlighting and mailing the bills in  
20 unless they insist - negotiate."

21 Dated: April 16, 1999

LAW OFFICES OF LIONEL Z. GLANCY

22 By 

23 Lionel Z. Glancy, Esquire  
24 Peter A. Binkow, Esquire  
25 Attorneys for Plaintiff

26 1801 Avenue of the Stars  
27 Suite 308  
28 Los Angeles, California 90067  
(310) 201-9150

1 MICHAEL B. HYMAN  
2 MARY JANE EDELSTEIN FAIT  
3 ELLYN M. LANSING  
4 MUCH SHELIST FREED DENENBERG  
5 AMENT BELL & RUBENSTEIN, P.C.  
6 200 North LaSalle Street, Suite 2100  
7 Chicago, IL 60601-1095  
8 (312) 346-3100

9 KEITH S. SHINDLER  
10 LAW OFFICES OF KEITH S. SHINDLER  
11 839 West Van Buren  
12 Chicago, IL 60607  
13 (312) 421-1000

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Keith S. Shindler  
Law Offices of Keith  
S.Shindler  
839 West Van Buren  
Chicago, Illinois 60607

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**EXHIBIT 5**



LOS ANGELES CELLULAR TELEPHONE COMPANY  
6045 Slauson  
Los Angeles, California 90040

Schedule C.P.U.C. No. 1-T  
Original Sheet No. Title

PRELIMINARY STATEMENT  
APPLICABLE TO  
CELLULAR RADIO TELECOMMUNICATIONS SERVICE  
OF  
LOS ANGELES CELLULAR TELEPHONE COMPANY

This schedule contains a general statement relative to the filing of rates and rules, the territory served and service rendered, and the availability of tariff sheets.

This schedule also lists all the tariff schedules of Los Angeles Cellular Telephone Company on file with the Public Utilities Commission of the State of California for service in the Los Angeles CGSA.

Certified to be a True Copy  
for the Original  
*Wesley Frank*  
Assistant Secretary, Department of Public Utilities  
State of California

Advice Letter No. <u>19</u>	Issued by <u>Howard Franton</u> NAME <u>President</u> TITLE	Date Filed <u>FEB 27 1989</u> Effective <u>APR 01 1989</u> Resolution No. _____
Decision No. _____		

LOS ANGELES CELLULAR TELEPHONE COMPANY  
6045 Slauson  
Los Angeles, California 90040

Schedule C.P.U.C. No. 2-TOriginal Sheet No. 17

## Rule No. 14

LIMITATION OF LIABILITY

- A. The Company's liability to its customers for interruptions in the service furnished by the Company is as follows:
1. A credit allowance to the customer will be made, at the customer's request, in the form of a pro rata adjustment of the fixed monthly charges billed by the Company for the period of the interruption, as its full and complete liability. In the event the customer is affected by such interruption for a period of less than 24 hours, no such adjustment shall be made. No adjustments shall be made by accumulating periods of non-continuous interruption.
  2. Any such interruption will be measured from the time it is reported to or detected by the Company, whichever occurs first.
  3. The credit allowance will be computed by dividing the duration of the service interruption (measured in days from the time the interruption is reported to or detected by the Company, whichever occurs first) by a standard 30-day month, and then multiplying the result by the Company's fixed monthly charges for each interrupted access number. A period of time less than 24 continuous hours shall not be credited. In no case shall the credit exceed the fixed monthly charges. No other liability shall attach to the Company in consideration of such interruption to service.
  4. A credit allowance will not be given for interruptions caused by the negligence or willful act of the customer or interruptions caused by failure of equipment or service not provided by the Company.
  5. The provisions of this Rule No. 14 do not apply to errors or omissions caused by willful misconduct, fraudulent conduct or violations of law.
  6. In the case of dropped or garbled calls; and on receipt of appropriate proof, the Utility will extend credit to the customer for part or all of the usage charges applicable to the calls in question. In the case of credits sought by a certificated reseller, Utility may also require a showing that any credit issued has been or will be passed through to the relevant end user.

Original  
*Wesley Frank*

Issued by

Advice Letter No. 19Date Filed FEB 27 1989

Decision No. \_\_\_\_\_

Howard Frantom

NAME

Effective APR 09 1989President

TITLE

Resolution No. \_\_\_\_\_

Rule No. 14

LIMITATION OF LIABILITY  
(Continued)

7. Because the precise cause and resulting damages from a missed or garbled telephone message are difficult to ascertain, and because the subscriber rather than the Utility is better placed to insure against such damages, the liability of the Utility shall be limited in the case of errors or omissions resulting from its own negligence to the sum of \$500, and, in the event of gross negligence by the Utility, to the sum of \$5,000. Utility may request subscriber's acknowledgment and agreement to this and the other terms and conditions of these tariffs by signing an appropriate Service Agreement. In the event of an inconsistency between the Service Agreement and these tariffs, the tariffs shall govern.
8. Claims for credits by non-reseller customers on account of service interruptions or for missed, dropped or garbled calls shall be made within ninety days after the end of the relevant customer's billing cycle in which the interruption or other malfunction is alleged to have occurred. Reseller customers shall make such claims within 120 days after the end of the relevant billing cycle.
- B. The Company shall in no event be liable for interruptions, delays, errors, or defects in transmission, or failure to transmit when caused by acts of God, fire, war, riots, Government authorities, or other causes beyond its exclusive control.
- C. The liability of the Company for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission, or errors in directory listings, not caused by the gross negligence or wilful misconduct of the Company shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of the serving disruption.
- D. Subject to the provisions of Paragraph (C) of this Rule, the Company will allow an amount monthly not to exceed the amount of the monthly charge for a directory listing in the event that there are errors or omissions in the listing. Credit will be given for air time charged for the receipt of wrong number calls resulting from outdated directory listings. For credit to be given, adequate information must be provided to the Company to allow verification of such wrong number calls. Such credit will be allowed for up to 6 months following the last disconnection of an access number.

(N)

(N)

Advice Letter No. 555 Issued by David T. Stevens Date Filed JAN 24 1995  
Decision No.                      NAME                      Effective JAN 24 1995  
Acting General Manager TITLE Resolution No.                     

*Western*  
Certified as a True Copy  
of the Original

**EXHIBIT 6**

EF  
Gibson  
1 GIBSON, DUNN & CRUTCHER LLP  
2 JAMES R. MARTIN, SBN 045602  
3 DANIEL S. FLOYD, SBN 123819  
4 ROBERT H. WRIGHT, SBN 155489  
5 SEAN P. GATES, SBN 186247  
6 333 South Grand Avenue  
7 Los Angeles, California 90071-3197  
8 (213) 229-7000

9 Attorneys for Defendant Los Angeles Cellular  
10 Telephone Company

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES

13 ERIKA LANDIN, on behalf of herself and  
14 all others similarly situated,

15 Plaintiff,

16 v.

17 LOS ANGELES CELLULAR TELEPHONE  
18 COMPANY,

19 Defendant.

CASE NO. BC 143305

Assigned to the Honorable Ernest M. Hiroshige

**NOTICE OF MOTION AND MOTION OF  
LOS ANGELES CELLULAR TELEPHONE  
COMPANY FOR SUMMARY JUDGMENT  
OR, IN THE ALTERNATIVE, SUMMARY  
ADJUDICATION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

[Separate Statement of Undisputed Facts,  
Declaration of Stephen Fowler, Declaration of  
Robert Wright, and Statement of Non-California  
and Regulatory Authority filed herewith]

Date: July 30, 1997  
Time: 9:00 a.m.  
Dept: 54

Trial Date: None Set

CLASS ACTION

20 TO PLAINTIFF ERIKA LANDIN AND HER ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on July 30, 1997 at 9:00 a.m. or as soon thereafter as  
22 counsel may be heard in Department 54 of the above-entitled Court located at 111 North Hill  
23 Street, Los Angeles, California 90012, defendant Los Angeles Cellular Telephone Company  
24

1 ("L.A. Cellular") will move this Court pursuant to Section 437c of the California Code of  
2 Civil Procedure for summary judgment in favor of defendant L.A. Cellular and against  
3 plaintiff Erika Landin on the ground that there is no genuine issue as to any material fact and  
4 that L.A. Cellular is entitled to judgment as a matter of law.

5 In the alternative, L.A. Cellular moves this Court, pursuant to Section 437c of the  
6 California Code of Civil Procedure, for summary adjudication as follows:

7 Issue Number 1: Plaintiff cannot premise any cause of action on the alleged  
8 concealment of L.A. Cellular's dropped-calls policy. Because L.A. Cellular has filed tariffs  
9 with the California Public Utilities Commission governing its dropped-calls policy, plaintiff  
10 cannot base her first, second, or third cause of action on an alleged concealment of this  
11 policy. There is no genuine issue as to any material fact as to this issue and L.A. Cellular is  
12 entitled to judgment as a matter of law. (See Separate Statement of Undisputed Facts,  
13 Facts 18 - 26.)

14 Issue Number 2: Plaintiff cannot premise any cause of action on the alleged  
15 unfairness of L.A. Cellular's dropped-calls policy. This policy is governed by a tariff, which  
16 has the force and effect of law. Plaintiff's complaint, in as much as it challenges the  
17 provisions of L.A. Cellular's dropped-calls policy, attacks the tariff. This Court is without  
18 jurisdiction to review L.A. Cellular's dropped-calls tariff. There is no genuine issue as to any  
19 material fact as to this issue and L.A. Cellular is entitled to judgment as a matter of law. (See  
20 Separate Statement of Undisputed Facts, Facts 27 - 37.)

21 Issue Number 3: Plaintiff cannot premise any cause of action on the alleged  
22 inadequacy of L.A. Cellular's customer service. The Court, without legislative or  
23 administrative guidance, cannot determine the appropriate standard for and should not  
24 embroil itself in the micromanagement of L.A. Cellular's customer service. There is no  
25 genuine issue as to any material fact as to this issue and L.A. Cellular is entitled to judgment  
26 as a matter of law. (See Separate Statement of Undisputed Facts, Facts 38 - 42.)

27 In support of its Motion, L.A. Cellular requests that, pursuant to Section 452 of the  
28 California Evidence Code, the Court take judicial notice of the following tariff materials on